



Colorado Housing Affordability Project Issue Brief No. XX: Legal Challenges to Land Use Reform

This paper is one in a series of Colorado Housing Affordability Project issue briefs summarizing the latest research on housing concerns statewide, from the origins of the affordability crisis to the best practices for addressing it. For every topic, CHAP's subject-matter-expert authors identify a component of that crisis, deliver the information essential to understanding the issue, and provide links or citations to further explore the supporting research. The entire CHAP issue brief series is available at <https://cohousingaffordabilityproject.org/the-research/> and continues to grow, so check back often.

The Issue: Would CHAP's proposals for land use reform withstand a legal challenge?

The Takeaway: In general, there are two limitations on the state's ability to begin mandating local government's land use and zoning regulations in accordance with the proposals. The first is the people's Power of Referendum which allows citizens to place certain matters of the General Assembly up for statewide election. The second concerns whether the proposals pertain to a statewide interest and, in turn, whether Home Rule municipalities have to comply with the proposals. The CHAP proposals would, under the correct circumstances, prevail in a legal challenge on the second grounds. Whether a referendum defeats the CHAP proposals would depend upon a political process and is therefore not capable of analysis at this time.

The Research: Legislation can always draw legal challenges. The following sections identify and assess the two likeliest challenges to CHAP's proposals: A statewide referendum and local government litigation asserting that Home Rule Municipalities, not the state, enjoy the sole authority to regulate local land use concerns.

The Colorado Constitution Authorizes the General Assembly to Regulate Land Use. The Colorado Constitution grants the legislative power of the state to the General Assembly.¹ The General Assembly has delegated most land use and zoning control to local governments.² State statutes, for example structure localities' zoning and subdivision regulations. However, even though local governments are empowered to regulate land use, the legislature may still modify or limit that grant of authority. Neither the state nor the federal constitution limits the General Assembly's continued ability to create land use controls.³

¹ Colo. Const. art. V, §1 (West, Westlaw through Aug. 2021).

² Colo. Rev. Stat. §29-20-102 (2021); *Land Use Planning and Regulation in Colorado*, Planning For Hazards: Land Use Solutions for Colorado, <https://www.planningforhazards.com/land-use-planning-and-regulation-colorado#:~:text=Colorado%20is%20a%20%E2%80%9Clocal%20control,governments%2C%20not%20by%20the%20state.&text=Local%20Government%20Land%20Use%20Control,%2D20%2D101%2C%20et> (last visited July 19, 2021); see Colo. Rev. Stat. 29-20-104 (2021).

³ Colo. Rev. Stat. §29-20-101 (2021). For policy reasons, the General Assembly has chosen to delegate this great power to individual "counties and municipalities", but there are no constitutional requirements that the state continue to allow such broad local control.



If the state enacts CHAP’s proposals, the people’s power of Referendum and Home Rule Municipalities’ power to self-govern present challenges to ensuring local governments comply with the proposals.

Opposition by Referendum. Pursuant to the Colorado Constitution, the citizens of Colorado “reserve power ... to approve or reject at the polls any [legislative] act ... of the General Assembly”⁴ (“Referendum”). A Referendum may be ordered for any act except those relating to public safety or state appropriations.⁵ In order to exercise this power, citizens must file a “...petition signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of the secretary of state at the previous general election....”⁶ This petition must then be filed with the secretary of state 90 days after the final adjournment of the General Assembly that passed the bill on which the referendum is demanded.⁷ Provided these requirements are met, citizens of the state could demand a referendum on the proposals. If this occurs, the text of the referendum will be placed on the ballot as a statewide election issue.⁸ In order to overturn the legislation on the ballot, a majority statewide vote is required.⁹

While there seem to be few ways to limit the people’s power of Referendum,¹⁰ it only applies to acts passed by the General Assembly and does not extend to local ordinances.¹¹ This is especially noteworthy because most of the CHAP proposals only concern a handful of counties, while the Referendum vote requires a statewide majority. Therefore, opposition by Referendum is largely a political risk to the CHAP proposals, rather than a legal one, in which rural counties will have some say in whether more populous counties could be subject to the CHAP legislation.

Home Rule Municipalities’ Power of Self-Governance. The state has historically authorized local governments to regulate land use. Therefore, removing some of this authority may create pushback or conflict. Specifically, Home Rule municipalities may choose to litigate whether the legislature can supersede their land use authority.

The Colorado Constitution provides that people of cities or towns “having a population of two thousand inhabitants (a “Home Rule Municipality”)...are vested with, and shall always have the power to make, amend ... or replace the charter of their city or town” and that any modifications will serve as the “organic law” and “supersede...any law of the state.”¹² This is a significant grant of power that is intended to provide Home Rule municipalities with the full right of self-governance in local and municipal matters.¹³ Pursuant to this, if the state passes a law that conflicts

⁴ Colo. Const., Article V, §1(1) (West, Westlaw through Aug. 2021).

⁵ *Id.* at (3).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at (7.3).

⁹ *Id.* at (4).

¹⁰ Not even the governor of the state has veto power over the referendum. *Id.*

¹¹ *See Id.* at (3).

¹² Colo. Const. art. XX, §6 (2021).

¹³ *Id.*



with an existing Home Rule ordinance, the Home Rule Municipality may sue the state and assert that within the boundaries of the municipality, their ordinance supersedes the state statute.

However, Home Rule Municipality ordinances may supersede state statutes only if (1) the state statute and the Home Rule ordinance are in conflict, and (2) the ordinance pertains to a purely local concern.¹⁴ “In determining whether an ordinance is in ‘conflict’ with [state statutes], the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.”¹⁵

Determining whether something is of statewide, local, or mixed concern requires a flexible, fact based analysis for which the courts have “not developed a particular test....”¹⁶ Rather, “there are several general factors which are useful to consider” in making the determination.¹⁷ Generally, “the relative interests of the state” and the Home Rule Municipality are considered first.¹⁸ For example, in *National Advertising*, the General Assembly passed an act regarding highway advertising that was in conflict with a Home Rule Municipality ordinance.¹⁹ In the act, the General Assembly enumerated several goals with the stated purpose of “promot[ing] health, safety, and welfare for the traveling public and people of Colorado.”²⁰ After weighing the relative interests, the court concluded that while the municipality may have strong interests in regulating the advertising, the state had an overwhelming interest in its enumerated goals.²¹

In weighing the relative interests, courts have relied on two factors to determine if the state’s interest is sufficient to overcome the Home Rule’s interest. First, “the need for statewide uniformity of regulation....”²² Specifically, the courts often hold a matter to be of statewide concern if it is important for the overall health, peace, safety, and general welfare of state’s citizens.²³ For example, in *Huff v. Mayor of Colorado Springs*, the Court held that the matter of “firefighters’ pensions [was] a matter of statewide interest and concern.”²⁴ The Court reasoned that “in order to attract the caliber of individuals necessary [for quality firefighting], [all] municipalities must offer a [high quality] compensation plan.”²⁵ The second factor considers, “the impact of the [ordinance] on persons living outside the” Home Rule’s limits.²⁶ In *National Advertising*, the state’s interest was especially compelling because without restrictive outdoor advertising on highways, the state ran a risk of losing its federal-highway funding.²⁷ The court reasoned that “permitting a Home Rule Municipality to establish a regulatory scheme for outdoor advertising

¹⁴ *Vela v. People*, 174 Colo. 465, 467 (1971).

¹⁵ *Ray v. City and County of Denver*, 109 Colo. 74, 77 (1942).

¹⁶ *City and County of Denver v. State*, 788 P.2d 764 (1990).

¹⁷ *Id.* at 768.

¹⁸ *Id.*

¹⁹ *National Advertising*, 751 P.2d 632, 634 (1988).

²⁰ *Id.*

²¹ *Id.* at 636.

²² *Id.*

²³ *Huff v. Mayor of Colorado Springs*, 512 P.2d 632 (1973); See also *National Advertising Co. v. Department of Highways of State of Colo.*, 751 P.2d 632.

²⁴ *Huff*, 512 P.2d at 635.

²⁵ *Id.* at 634.

²⁶ *City and County of Denver* at 768.

²⁷ *National Advertising* at 637.



signs [that is] less restrictive than [the state law,] would..." unfairly impact citizens outside the municipality by "...impair[ing]... Colorado's continued eligibility for federal-highway funding... and unduly depreciate[ing] the importance of..." the statute's enumerated goals.²⁸

Other relevant considerations include "whether a particular matter is one traditionally governed by state or by local governments" and whether intergovernmental cooperation is necessary.²⁹ Finally, whether the "...Colorado Constitution specifically commits a particular matter to state or local regulation"³⁰ is also relevant.

If the court concludes that the ordinance pertains to a matter of statewide or mixed concern, the state law will supersede the Home Rule ordinance.³¹ By contrast, if the court concludes that the ordinance pertains to matters of local concern only, the Home Rule ordinance will not be superseded by the state's legislation.³²

A Home Rule Municipality With a Conflicting Ordinance is Unlikely to Prevail in an Attempt to Supersede State Legislation on CHAP's Proposals. It is likely that a court will conclude that the proposals and the overall goal of developing affordable housing is a matter of statewide concern.

Because the state holds an interest in housing affordability, CHAP's proposal would likely supersede Home Rule Municipalities' zoning authority. To be sure, courts have often recognized land use regulation as a local matter. Housing affordability in particular, however, raises concerns for the entire state.³³ As the Colorado Supreme Court explained, "[B]oth the municipality and the state have significant interests in maintaining the quality and quantity of affordable housing in the state. [Local] [o]rdinances . . . can change the dynamics of supply and demand in an important sector of the economy—the housing market."³⁴ Those mixed interests have justified state intervention in local land use regulations before and likely would again here.³⁵

Further, the state also has a strong interest in adopting uniform regulations because one municipality's exclusionary practices can worsen affordability in neighboring areas. This, in turn, puts extra strain on the affordability of these surrounding areas as they try and keep up with increasing populations. Thus, if as in *National Advertising*, outdoor advertising can be held to be a matter of statewide concern because of the state's interest in maintaining aesthetics and safety on the roadways and preventing unfair impacts on areas outside of the municipality. Certainly the state's interest in maintaining health and affordability in the state and reducing harmful impacts

²⁸ *Id.* at 638.

²⁹ *City and County of Denver*, 788 P.2d at 768.

³⁰ *Id.* For example, the Court has held that the regulation of the Denver Police force was a matter of local control because the Constitution specifically granted that power to the Home Rule Municipality of Denver. *Id.* at 770. Other matters, such as marijuana regulation, are specifically clarified as a statewide interest. Colo. Const. Art. 17, §16.

³¹ Colorado.gov, *Home Rule Authority*, https://leg.colorado.gov/sites/default/files/images/committees/2017/17sales_tax_home_rule_authority_08-15.pdf (2017).

³² *Id.*

³³ *E.g.*, *Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs*, 575 P.2d 835, 840 (Colo. 1978).

³⁴ *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000).

³⁵ *Id.* (concerning local rental control ordinance).



on people living outside a Home Rule Municipality is sufficient to deem CHAP's proposals a matter of statewide concern.

In addition, as in *Huff*, it is arguable that affordable housing and firefighting are similarly essential to the proper maintenance and health of the state. This is especially true given the state of the Colorado housing crisis.³⁶ Without some statewide uniformity, reasonable affordable housing, much like quality firefighting, will be difficult to maintain. Therefore, just like the Court reasoned firefighting to be a statewide concern, so too may it consider affordable housing to be a statewide concern.

³⁶ See Aldo Svaldi, *Colorado's Affordable-Housing Shortfall Needs a Crisis Response*, (June 26, 2021, 6:00 AM), <https://www.denverpost.com/2021/06/26/colorado-affordable-housing-shortfall-common-sense-institute/>.